Supreme Court U.S
FILED
FEB 22 2005
OFFICE OF THE CLERK

(6)

No. 04-603

OCTOBER, 2004 TERM

GABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,

Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING,
A Michigan corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF ON THE MERITS

Charles E. McFarland
Counsel of Record
338 Jackson Road
New Castle, KY
(502) 845-2754

Attorney for Petitioner

QUESTION FOR REVIEW

SUBSTANTIAL FEDERAL QUESTION AND ORIGINAL JURISDCITION IN DISTRICT COURT ARE PREREQUISITES BEFORE REMOVAL OF A STATE CASE TO FEDERAL DISTRICT COURT

28 U.S.C. §1441(b) allows removal of any state civil action in which the district courts have original jurisdiction wherein the claim is founded on a right arising under the Constitution, treaties or laws of the United States. This Court has routinely held that such removal requires both a substantial federal question and the district court must have original jurisdiction over the action.

The question for the Supreme Court to address is therefore, when there is a violation by the IRS of 26 U.S.C. §6335(a) by intentionally ignoring the prerequisite provision requiring personal service of notice of seizure before obtaining service by certified mail, whether the defendant in a state quiet title action can remove the action by claiming that the necessary interpretation of 26 U.S.C. §6335(a) as to whether strict compliance or substantial compliance with the statute constitutes a substantial federal question and creates original jurisdiction in the district court.

DISCLOSUE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERSTS

Pursuant to Sup. Ct. Rule 29.6 Garble & Sons Metal Products,Inc states:

1. It is not a subsidiary or affiliate of a publicly owned corporation; and

2. There is no publicly owned corporation that is not a party to this petition that has an interest in the outcome.

TABLE OF CONTENTS

Page

Question presented i

Disclosure of Corporate Affiliations and Financial Interests. ii

Table of Contents iii

Table of Cited Authorities v

Cases v

Statues and Other Authorities iiv

Appendix . . . . . App 1

Opinions Below 1

Statement of Jurisdiction 2

Statutory Provisions Involved 3

I. **Statement of the Case**. 5

II. **Summary of Jurisdiction Argument**. 6

III. **Argument on the Merits**
Substantial Federal Question and Original Jurisdiction in District Court are Prerequisites Before Removal of a State Case to Federal District Court. 8

A. **Introduction**. 8

B. General Removal Considerations 9

C. The Well-Pleaded Complaint Rule 12

D. In proper Broad Interpretation of the Jurisdiction Statutes 15

E. Failure to Require the Federal District Court to Have Original Jurisdiction... 19

F. Failure to Require Defendant to Shoulder Burden of Proving Original Jurisdiction and Presence of Substantial Federal Question..... 23

IV. **Conclusion**..... 32

APPENDIX *Brief App. Page*

28 U.S.C. § 1447.
Procedure after removal generally..... App. 1

Section 6335.
Sale of seized property ..... App. 2

28 U.S.C. §6339.
Legal effect of certificate of sale of personal property and deed of real property ..... App. 2

MCL §600.2932
Quieting title; interest of plaintiff; action by mortgagee; establishment of title; tenancy in common; actions..... App. 2

MRCP, Rule 3.411
Civil Action to Determine Interests in Land ..... App. 3

TABLE OF CITED AUTHORITIES

Cases: *Page*

American Well Works Company v. Lyne & Bowler Company, 241 U.S. 987 (1916) 16, 17

Amsouth Bank v. Dale, 386 F.3d 763 (6th Cir. 2004) ..... 30 at n3

Bender v. Williamsport Areas School District, 475 U.S. 534 (1986) 20

Beneficial National Bank v. Anderson, 539 U.S. 1 (2003).....7, 23, 32, 33

Binder & Binder PC v. Barnhart, 2005 U.S. App. LEXIS 2776 (2nd Cir. 2005) . 34 at n5

Board of Trustees of Painesville Township v. City of Painesville, Ohio, 200 F3d 396 (6th Cir. 1999) 30, 31

City of Huntsville v. City of Madison, 24 F.3d 169 (11th Cir. 1994) 29

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 11, 27

Crown Cork & Seal Co. v. Pennsylvania Human Relations Comm., 463 F.Supp. 120 (ED Pa. 1979)..... 21

Franchise Tax Board v. Construction Laborers Vacation Trust,
463, U.S. 1 (1983) 7, 13, 22, 26, 29, 32, 33

Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.,
207 F.Supp.2d 694, 697 (W.D. Mich 2002) . 1

Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing,
377 F.3d 592 (6th Cir. 2004) 1

Howery v. Allstate Insurance Co.,
243 F.3d 912, 918 (5th Cir. 2001) 25

Jairath v. Dyer,
154 F3d 1280 (11th Cir. 1998). 28, 29, 30

Long v. Bando Manufacturing of America, Inc.,
201 F.3d 754 (6th Cir. 2000) 25, 26, 27

Middlesex County Sewage Auth. v. National Sea Clammers Ass'n.,
453 U.S. 1 (1981) 31

Merrell Dow Parmaceuticals, Inc., v. Thompson,
478 U.S. 804 (1986)
. . . . . 7, 8, 13, 16, 25, 26, 27, 28, 29, 30, 32

Mulcahy v. Columbia Organic Chem. Co., Inc.,
29 F.3d 148 (4th Cir. 1994) . . . . . 28 at n2

Musson Theatrical Inc. v. Federal Express Corp.,
89 F.3d 1244 (6th Cir. 1996) 31

Nicodemus v. Union Pacific Corp.,
318 F.3d 1231 (10th Cir. 2003) . . . . . 31 at n4

PCS 2000 LP v. Romulus Telecomms., Inc.,
148 F.3d 32 (1st Cir. 1998) . . . . . 28 at n2

Seinfeld v. Austin,
39 F.3d 761 (7th Cir. 1994) 24, 25, 26, 27

Shamrock Oil & Gas Corp. v. Sheets,
313 U.S. 100 (1941). 11, 15

Shulthis v. McDougal,
225 U.S. 561 (1912). 13

Smith v. Industrial Valley Title Insurance Co.,
957 F.2d 90 (3rd Cir. 1992) 28

Syngenta Crop Protection v. Henson,
537 US 28 (2002). 11, 22

Tempelman v. *Colsia*,
2002 U.S. Dist. LEXIS 19037 (D.N.H. 2002) .14 at n1

Wander v. Kaus,
304 F.3d 856 (9th Cir. 2002). . . . . 28 at n2

Willy v. Coastal Corp.,
855 F.2d 1160 (5th Cir. 1988) . . . . . 28 at n2

Young v. IRS,
596 F.Supp. 141 (ND Ind. 1984) 21

Zubi v. AT&T Corp.,
219 F3d 220, (3rd Cir. 2000) . . . . . 28 at n2

Statutes and Other Authorities:

26 U.S.C. §6335 . . . . . App. 1

26 U.S.C. §6335(a) . . . . . *i*, 3, 5, 6, 8, 9, 14, 19, 21, 34

26 U.S.C. §6339 . . . . . App. 2

26 U.S.C. §6339(b) 3

26 U.S.C. §6339(b)(2) 8, 14

26 U.S.C. §6045(e)(3) 28

26 U.S.C. §§7400 – 7434 21

28 U.S.C. §1254(1). 2

28 U.S.C. §1331 . . . . . .3, 6, 10, 24

28 U.S.C. §1340 . . . . . .3, 15, 16, 20, 21, 22, 24

28 U.S.C. §1441(a) 5, 6, 9

28 U.S.C. §1441(b) 3, 10, 11, 15, 22

28 U.S.C. §1447 . . . . . 3, App. 1

28 U.S.C. §1447(c) 19

28 U.S.C. §2001 . . . . . 14 at n1

28 U.S.C. §2002 . . . . . 14 at n1

28 U.S.C. §2409a 22

28 U.S.C. §2410 22

33 U.S.C. §1365 30

Article III, Section 2, United States Constitution 3, 9

MCL §600.2932 . . . . . 3, 4, 17, 18, App. 2

MCL §§600.5701-600.5759. 18

Rule 3.411, Michigan Rules of Civil Procedure
. . . . . .3, 4, 17, 18, 19, App. 3

Supreme Court Rule 29.6. . . . . *ii*

OPINIONS BELOW

The order of District Court for the Western District of Michigan (per McKeague, D.W.) denying the petitioner's motion to remand, Writ Petition App. C at 12, is unpublished. The District Court's subsequent opinion granting judgment as a matter of law for Darue against Grable's action in quiet title is published at *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 207 F.Supp.2d 694, 697 (W.D. Mich 2002), Writ Petition App. B. The 6th Circuit Court of Appeal's opinion (per Chief Judge Boggs, joined by Circuit Judge Daughtrey and District Judge Aldrich) affirming the District Court's decision is published at *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 377 F.3d 592 (6th Cir. 2004), Writ Petition App. A at 1. A motion for rehearing was not made, nor was a stay of mandate sought. A Petition for a Writ of Certiorari was filed by Grable and the Writ was issued on January 7, 2005 for the issue of jurisdiction only.

STATEMENT OF JURISDICTION

The 6th Circuit Court of Appeals entered its opinion and order on July 27, 2004. Petitioner timely petitioned for a Writ of Certiorari on October 25, 2004, which was granted by this Court on January 7, 2005. 28 U.S.C. §1254(1) provides,

> **§1254. Courts of appeals; certiorari; certified questions**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; …

Accordingly, since a petition for a writ of certiorari was timely made and was issued by the Supreme Court, this has jurisdiction to review this case.

STATUTORY PROVISIONS INVOLVED

The following legal authorities are cited in the Brief on the Merits:

Article III, Section 2, Constitution of the United States of America;

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority."

28 U.S.C. §1331 reads:

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

28 U.S.C. §1340 reads:

> "The district courts shall have original jurisdiction of any civil action arising under and Act of Congress providing for the internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade."

28 U.S.C. §1441(a) in pertinent part:

> "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the

> defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

28 U.S.C. §1441(b) in pertinent part states,

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

28 U.S.C. §1447 is set forth in the appendix.

26 U.S.C. §6335(a) is set forth in the appendix.

26 U.S.C. §6339(b) including subsection **(2)** is set forth in the appendix.

MCL §600.2932 is set forth in the appendix.

Rule 3.411, Michigan Rules of Civil Procedure is set forth in pertinent part in the appendix.

I. STATEMENT OF THE CASE.

The Petitioner, Grable & Sons Metal Products, Inc. (Grable), is a corporation organized under the laws of the State of Michigan. Grable initiated a quiet title action in the Circuit Court for the County of Eaton, in the State of Michigan (Writ Response, App 2). The quiet title action arose under Michigan law, MCL §600.2932. The action was filed pursuant to Rule 3.411 of the Michigan Rules of Civil Procedure. The quiet title action named Darue Engineering & Manufacturing, Inc. (Darue) as the defendant. The United States was not named as a party.

Grable sought to quiet title to certain real estate located at 601-701 W. Plains Road in Eaton Rapids, Michigan. This property was allegedly seized by the IRS in 1994 to satisfy an unpaid tax assessment. The Grable complaint alleged as part of its quiet title cause of action that a cloud was created on the title of the property due to a void tax sale. The sale was fatally marred because the IRS failed to personally serve the corporation with the notice of seizure as required by 26 U.S.C. §6335(a) (Writ Response, App 2 at page 4-A). All the parties agree that the IRS failed to personally serve the corporation. The IRS later purported to sell the property through an auction to Darue in 1994. The IRS provided Darue with a quitclaim deed dated November 13, 1995.

Petitioner filed the quiet title action in Michigan on December 14, 2000. Darue removed the quiet title action to the United States District Court in the Western District of Michigan, Southern Division on January 16, 2001 (Doc #1 Notice of Removal, 6th Cir. APX, at 011-023). Grable sought a remand of the action (Doc #4, Motion to Remand, 6th Cir APX, at 039-044), but the district court denied the request on April 2, 2001 (Writ Petition, App B). The district court held that, due to the necessity of the

interpretation of the requirements of 26 U.S.C. §6335(a), it had jurisdiction pursuant to 28 U.S.C. §1331 over the matter because there was a federal question involved.

Grable appealed to the Sixth Circuit Court of Appeals. The 6th Circuit panel ruled that Grable had asserted a federal right because the interpretation of a revenue law was required for the resolution of the case. According to the 6th Circuit, Grable's claim was therefore a federal question rooted in the Internal Revenue Code. Due to the presence of a federal question the 6th Circuit held that the District Court had original jurisdiction (Writ Petition, App A).

Grable timely petitioned this Court for a Writ of Certiorari on October 25, 2004. The Court granted the writ on January 7, 2005 for the limited issue of jurisdiction.

II. SUMMARY OF JURISDICTION ARGUMENT

Plaintiff Grable filed a quiet title action against Defendant Darue alleging a violation of 26 U.S.C. §6335(a) which required personal service on the owner of the property of a notice of seizure. All parties agreed that no personal service as required by the statute was attempted by the IRS. Defendant Darue removed the case from the Eaton County Circuit Court to the Federal District Court for the Western District of Michigan, Southern Division claiming that the removal was proper due to the presence of a federal question under 28 U.S.C. §1441(b) because of the alleged violation of federal law, i.e. §6335(a). Defendant Darue also claimed that the removal was proper because the action arose under the Internal Revenue Code.

Removal can in fact be authorized if the cause of action filed in the state court was in fact a cause of action arising out of the United States Constitution or laws, or if the

state cause of action presents a substantial federal question. A third basis of removal, diversity of citizenship is not at issue in this case.

It is well established legal procedure that when determining whether a state case contains a substantial federal question sufficient to cause removal the courts first look to the well pleaded complaint. A case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue. The Supreme Court has held that the well-pleaded complaint rule applies to the original jurisdiction and removal jurisdiction of the district. See *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463, U.S. 1, 13 77 L.ED2d 420, 193 S.Ct. 2841 (1983); *Merrell Dow Parmaceuticals, Inc., v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed2d 650 (1986); and *Beneficial National Bank v. Anderson*, 539 U.S. 1, 156 L.Ed2d 1, 123 S.Ct. ___ (2003).

The 6th Circuit disregarded the well-pleaded complaint rule and developed its own arbitrary three part test to determine the presence of a federal question jurisdiction. The three part test set forth by the 6th Circuit panel was faulty in that: 1.) the test enabled Darue to skirt its burden to prove original jurisdiction; 2.) the three part test resulted in the creation of federal jurisdiction based upon the mere violation of federal law and/or standards; and 3.) the test negated the well established need for a federal private right of action as required by *Franchise Tax Board, Merrell Dow,* and *Beneficial.*

Darue was required to shoulder its burden of establishing that the District Court had original jurisdiction. The 6th Circuit, instead of requiring Darue to meet its burden, held that there was a federal question present due to the

alleged violation of federal in §6335(a). The 6th Circuit's reasoning is inconsistent with this Court's decision in *Merrell Dow Parmaceuticals, Inc., v. Thompson*, supra, because Grable only alleged a violation of 26 U.S.C. §6335(a). Congress did not provide a private federal remedy or a private federal claim for such a violation.

This case is now before this Court to determine if an intentional violation federal law, i.e. the personal service requirements of 26 U.S.C. §6335(a), where there is no private federal remedy, can be elevated to the status of a substantial federal question because the defendant alleges that a construction of federal law, i.e. 26 U.S.C. §§6335(a) and 6339(b)(2) is required to determine the outcome.

III. ARGUMENT ON THE MERITS

SUBSTANTIAL FEDERAL QUESTION AND ORIGINAL JURISDCITION IN DISTRICT COURT ARE PREREQUISITES BEFORE REMOVAL OF A STATE CASE TO FEDERAL DISTRICT COURT

A. Introduction.

Petitioner Grable filed a quiet title action in the State of Michigan alleging that the title to property it claimed was clouded by the adverse real estate title claims of Darue. Within its state quiet title action Grable alleged that there was a cloud on its title to real estate because Darue claimed to have a title stemming from the IRS issuing a quitclaim deed based on a purported tax sale. 26 U.S.C. §6335(a) made it a requirement, prior to the sale, that the owner of the property be personally served in writing with the notice of seizure or the notice be left at the owner's place of abode or business a requirement (hereinafter referred to as 'personal service requirements'). All parties agreed that the IRS made no

attempt to fulfill the legal requirements of 26 U.S.C. §6335(a). Darue, using 28 U.S.C. §1441(b) as its authority, removed the state quiet title action to the Western District of Michigan alleging that there was a substantial federal question involving the interpretation of the personal service requirements of 26 U.S.C. §6335(a). The district court denied Grable's motion to remand and the Sixth Circuit upheld that denial.

The actions and manner in which the Sixth Circuit arrived at its decision to uphold the denial of the remand so far departed from the usual course of judicial proceedings and permitted the Western District Court of Michigan to depart from the normal removal procedures that this Court's supervisory power is needed to correct error. The 6th Circuit should have corrected the district court's jurisdictional error in denying Grable's motion to remand by addressing the jurisdictional statute that Darue relied upon to remove the state quiet title action and the district court upheld. But instead, the Sixth Circuit mixed and matched several jurisdictional statutes to arrive at an incorrect and unsupported rationale to affirm the district court's denial of Grable's remand motion.

B. General Removal Considerations.

The issue of the jurisdiction of the federal courts is firmly rooted in the Constitution of the United States. Article III, Section 2 states,

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority."

The foregoing constitutional provision was codified in 28 U.S.C. §1331. Section 1331 reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." This also applies to cases filed in state court in which the defendant desires to remove the case to a federal district court.

Under normal and accepted judicial process, when a plaintiff files a state cause of action in the state courts, the defendant has the option of removing the cause of action to a federal district court under the removal statutes provided by Congress in 28 U.S.C. §§1441(a) and (b).

28 U.S.C. §1441(a) in pertinent part states,

> "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

Through section 1441(a), Congress has permitted a defendant in a state case to remove any civil action to the district court, if the federal court has original jurisdiction. Apparently, the panel for the Sixth Circuit that upheld the district court's denial of Grable's request for a remand was confused as to the exact statute that Darue relied upon to remove the quiet title action to the district court. While Darue removed the quiet title action from state court to the district court based on 28 U.S.C. §1441(b), the Sixth Circuit panel cited 28 U.S.C. §1441(a), see the Sixth Circuit opinion, Writ Petition, App. A at 3.

The second ground for removal, and the one that Darue actually relied upon and the 6th Circuit should have addressed, is 28 U.S.C. §1441(b).

Section 1441(b) in pertinent part states,

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

Through 28 U.S.C. §1441(b), Congress has permitted a defendant in a state case to remove any civil action which is founded on a claim or right arising under the Constitution, treaties or laws of the United States to the district court, if the federal court has original jurisdiction. This section has been interpreted to allow removal when there is a 'substantial federal question,' see *City of Chicago v. International College of Surgeons,* 522 U.S. 156, 139 L.Ed2d 525, 535, 118 S.Ct. 523 (1997)

Whether 28 U.S.C. §1441(a) or §1441(b) is the proper jurisdictional foundation for removal in this case, certain legal principles remain the same. *First*, because the jurisdictional removal statutes implicate federalism concerns they must be construed narrowly, *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100,108-09, 61 S.Ct. 868, 85 L.Ed 1214 (1941). *Second*, one of the prerequisites of the removal statutes is that a defendant must show that the district court to which removal is sought has original jurisdiction over the cause of action, *Syngenta Crop Protection v. Henson*, 537 US 28, 123 S.Ct. 366, 154 L.Ed2d 368, 371 (2002). *Third,* when removal is sought, the burden of proof is on the defendant to show that the district court does in fact have original jurisdiction, *Syngenta* supra, 154 L.Ed2d at 372.

The 6th Circuit Court of Appeals decision to sanction the denial of a remand where the district court did not have jurisdiction is not consistent with the statutes and the holdings of this Court. As such it warrants this Court's review and remand. The decision itself sets forth a three part test for a federal question that is that is not supported by any precedents of this Court because it is incomplete. The decision eliminates the necessity of proving original jurisdiction thereby greatly expanding the limited jurisdiction of the federal district courts in removal situation. The decision also attempts to expand a simple violation of federal law into a substantial federal question, contrary to the holdings of this Court and at least one other United States Court of Appeals. Finally, the decision also eliminates the need to establish the presence of a federally created right of action. Should the Sixth Circuit's decision be allowed to stand it would be an open invitation for all litigants that they may now remove a state case with a simple federal question, or with just a violation of federal law, without having to show original jurisdiction in the district court. Such an open invitation will clog an already overburdened federal judicial system and is contrary to the guidance given by this Court's earlier decisions

C. The Well-Pleaded Complaint Rule.

The decision below conflicts with numerous decisions of this Court and at least one other circuit requiring evidence of original jurisdiction in the federal district court before a removal can stand.

The Sixth Circuit departed from the foregoing standard judicial process by broadly interpreting the jurisdictional statutes, by not requiring the federal district court to have original jurisdiction and by not placing the

burden on the defendant to show the district court had original jurisdiction. An initial matter showing the 6th Circuits departure from the normal procedure must first be addressed.

It is well established law that when the issue of a substantial federal question arises because of a defendant's removal the courts will resort to 'well-pleaded complaint doctrine,' to determine is a substantial federal question is actually present. This Court in *Franchise Tax Board*, supra 463, U.S. at 13 indicated that a federal question jurisdiction might arise where "it appears that some substantial, ***disputed question*** of federal law is a necessary element of one of the well-pleaded state claims," emphasis added. The *Merrell Dow*, supra case and a more recent case, *Beneficial National* supra, also endorse the 'well-pleaded complaint' doctrine.

Under the well pleaded complaint doctrine the alleged substantial federal question must appear on the face of the complaint. Not only must the federal question appear on the face, but it must also be essential for the cause of action and the federal question must be a real controversy, i.e. disputed.

This Court in *Shulthis v. McDougal,* 225 U.S. 561, 569-70, 56 L.Ed2d 1205, 32 S.Ct. 704 (1912) addressed the importance of the need that the federal question actually be disputed.

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which result depends." *Shulthis,* supra.

In Grable's quiet title action filed in Michigan a violation of federal law is alleged in the complaint. As will be seen below, the allegation of the violation of the federal law, i.e. 26 U.S.C. §6335(a) is an essential element of Grable's proof that that cloud exists of the title to real estate. But this is the extent to which the federal question in Grable's complaint meets the well-pleaded complaint doctrine. There is no dispute that 26 U.S.C. §6335(a) was violated. In fact, both parties agree, and the government admitted that the personal service requirements of section §6335(a) were violated.[1]

The final prerequisite for a 'substantial federal question' is a real dispute respecting the federal question. That dispute did not surface until Darue interposed the question of whether 26 U.S.C 6339(b)(2) applied to §6335(a). Thus, the necessary dispute of a federal question was not in fact in Grable's complaint, but rather in Darue's defense. Accordingly, under the well-pleaded complaint doctrine there was no substantial federal question. Grable's quiet title complaint was therefore improperly removed and the district court erred when

---

[1] The District Court in New Hampshire was faced with a very similar situation in *Tempelman* v. *Colsia, 2002 U.S. Dist. LEXIS 19037 (D.N.H. 2002)*. In the *Tempelman* case the property sale was made by the U.S. Marshal. The Tempelmans invoked 28 U.S.C. §2001 and §2002 as the grounds for invalidating the deed. The complaint did not challenge the meaning, interpretation, or constitutionality of either statute. Instead, it alleged that the sale of the property did not comply with the statutory requirements. A purely factual issue was raised. The district court found that merely alleging the factual violation a federal statute did not allege a claim arising under federal law, despite the reliance on federal statutes.

it denied the motion to remand. Had the 6th Circuit adhered to the well-pleaded complaint procedure it would have had to reverse the denial of the remand because the district court had no jurisdiction. This Court must correct the 6th Circuit's error.

D. Improper Broad Interpretation of the Jurisdictional Statutes.

Instead of applying the well-pleaded complaint test and rather than directly addressing the question raised on appeal by Grable, the 6th Circuit chose to develop an incorrect alternative rationale to justify its refusal to reverse the district court's decision to keep the removed case. The Sixth Circuit began its Federal Question Jurisdiction discussion, not only with the wrong removal statute 28 U.S.C. §1441(a), but also with an inapplicable jurisdictional statute. The panel recognized 28 U.S.C. §1331 as the correct judicial statute. Section 1331 reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." The language of section 1331 is basically the same as removal statute of section 1441(b).

The panel did not discuss or examine the applicability of section 1331 to the present case because, in the Sixth Circuit's view, section 1331 took a subordinate place in original jurisdiction scheme. Another jurisdictional statute was felt to be more important. The panel chose to rely on 28 U.S.C. §1340 for original jurisdiction by stating, "The District courts have original jurisdiction over an civil action 'arising under any Act of Congress providing for the internal revenue ... .'" In opting to rely on 28 U.S.C. §1340 the Sixth Circuit departed from the widely accepted principle of construing the removal statutes narrowly, see *Shamrock Oil,* supra. In the process of attempting to broaden the scope for

removal, the Sixth Circuit created a new and an independent original jurisdiction for the district court through 28 U.S.C. §1340. This new and independent jurisdiction through section 1340 is an issue of first impression before the United States Supreme Court.

Had the 6th Circuit followed the normal, accepted judicial reasoning associated with removal statutes it would have adopted a line of reasoning similar to the one below. By following this line of reasoning, or one parallel to it, the Sixth Circuit would have recognized immediately that section 1340 did not give the district court independent original jurisdiction. The line of reasoning the 6th Circuit should have followed is as follows:

Question, "Does this quiet title civil action arise under any Act of Congress providing for internal revenue?"

If the answer is no, the district court lacked jurisdiction and the discussion is over. Unfortunately, the 6th Circuit determined that the answer was yes. Thus, its decision must be closely dissected.

In this case the action is a quiet title action arising from the laws of Michigan. In *American Well Works Company v Lyne & Bowler Company*, 241 U.S. 987, 60 L.Ed 987, 36 S.Ct. 585 (1916), Justice Holmes established a test for determining under what law a suit arises. His simple, but profound observation was, "A suit arises under the law that creates the cause of action." Justice Holmes' test has been repeated cited by both appellate case and this Court. Recently, the test was cited in *Merrell Dow,* supra 92 L.Ed2d at 658. A thoughtful examination of Holmes' reasoning process as applied to this case will show that Grable's quiet title action did not arise under the Internal Revenue Code, but rather, under state law.

In *American Well Works* a suit for damages to a business caused by a threat to sue under the patent law was brought in a state court. It was removed by the defendant with the claim that the suit arose under the patent law. Justice Holmes came to the conclusion that the suit was not itself a suit under the patent law. His analysis was as follows:

Holmes reasoned that what made the defendant's act wrong was its manifest tendency to injure the plaintiff's business. According to Holmes the alleged wrong would be the same by whatever the means by which it is accomplished. But whether it is wrong or not depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state.

By paralleling Holmes' reasoning as a model to a quiet title action filed in Michigan a similar result would be reached. But first it is necessary to determine what the Michigan law regarding quiet title actions requires.

MCL §600.2932 provides in pertinent part:

> Sec. 2932.
> (1) Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

The filing of a quiet title action in Michigan is governed by Rule 3.411 of the Michigan Rules of Civil

Procedure. Rule 3.411 in pertinent part sets forth the necessary elements of a quiet title action as follows:

> (A) This rule applies to actions to determine interests in land under MCL 600.2932. It does not apply to summary proceedings to recover possession of premises under MCL 600.5701-600.5759.
>
> (B) Complaint.
> (1) The complaint must describe the land in question with reasonable certainty by stating
> (a) the section, township, and range of the premises;
> (b) the number of the block and lot of the premises; or
> (c) another description of the premises sufficiently clear so that the premises may be identified.
>
> (2) The complaint must allege
> (a) the interest the plaintiff claims in the premises;
> (b) the interest the defendant claims in the premises; and
> (c) the facts establishing the superiority of the plaintiff's claim.

It is clear that required elements of a quiet title in Michigan included the facts that created the cloud on the title. Thus, any involvement of federal law in this case does not create a quiet title action, but is merely a required element of facts.

Thus, through applying Justice Holmes' model, a similar conclusion is reached. What made the act (or failure

to act) of the IRS intentionally not complying with the mandatory personal service requirements of 26 U.S.C. §6335(a) was its tendency to cloud the title to the property. According Rule 3.411, it does not matter how the cloud was created, but rather that a cloud marred the title of the property. Whether there is a cloud on the title depends not on IRS law, but on the law of the state where the title was clouded.

Thus, the answer to the question, "Does this quiet title civil action arise under any Act of Congress providing for internal revenue?" is no.

Thus, the district court with the approval of the 6th Circuit improperly broadened the scope of 28 U.S.C. §1441(b).

E. Failure to Require the Federal District Court to Have Original Jurisdiction.

Rather than narrowly, interpreting the removal statute and denying jurisdiction, the 6th Circuit concluded that the answer to the 'arising under' jurisdictional question was yes. Accordingly, the next step in the line of reasoning that should be followed is:

If the answer is yes, then the question is, "Under what Act of Congress does the action arise?" A specific statute authorizing jurisdiction is needed to answer this question is required due to the phrase "any civil action of which the district courts have ***original jurisdiction*** ... ." Emphasis added. 28 U.S.C. §1447(c), also contains a statement requiring original jurisdiction. That statement says, "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction the case shall be remanded."

A specific statute is required to show jurisdiction because federal courts have limited jurisdiction and can function only with the power authorized by Article III of the Constitution of the United States and the statutes passed by Congress in accordance with the Constitution. This Court in *Bender v. Williamsport Areas School District*, 475 U.S. 534, 89 L.Ed2d 501, 511, 106 S.Ct. 1326 (1986) conclusively restated this basic principle limiting the jurisdictional power of the federal courts.

Adhering to the basic principles of jurisdictional prudence is where the Sixth Circuit falters. Neither Darue nor the Sixth Circuit stated, nor can they state, what Act of Congress authorized the civil action of quiet title as between two private parties. This is because Congress has not passed an act allowing for the private resolution of a quiet title between two private citizens of the same state.

So, even after the 6th Circuit has issued its opinion, the question remains, "What right or immunity was created by what Act of Congress providing for revenue, or for that matter any Act of Congress, constitutes Grable's alleged cause of action founded in quiet title?" The question asked in from another perspective raises a disturbing answer. "By what authority did the district court quiet title?" As it will be seen, there was no authority for the district court to quiet title.

The 6th Circuit in its opinion held that because Grable's quiet title action was based on the faulty process in a tax sale the cause of action arose under federal law. Presumably this was a reference to 28 U.S.C. §1340, which was mentioned by the 6th Circuit in its introduction to the "Federal Question Jurisdiction" section of its opinion. What legal authority supported the 6th Circuit's conclusion is unstated. Furthermore, it is difficult to conjure such because the Supreme Court has never specifically addressed 28 U.S.C. §1340. Several lower courts have, however.

In *Young v. IRS*, 596 F.Supp. 141 (ND Ind. 1984), the district court stated, "The very language of the statute indicates that this section does not create jurisdiction in and of itself. Section 1340 makes it clear that the jurisdiction extends to civil actions arising under the Internal Revenue laws; as such, the suit must be based on some cause of action which the Internal Code recognizes and allows the plaintiff to bring. Absent some recognition of this kind of suit under the Internal Revenue Code, §1340 will not create an independent basis for jurisdiction. At least one court has recognized that jurisdictional statutes such as §1340 did not grant original jurisdiction, but simply waive certain jurisdiction requirements, see *Crown Cork & Seal Co. v. Pennsylvania Human Relations Comm.*, 463 F.Supp. 120, 127 n.8 (ED Pa. 1979).

The *Young*, court also stated, "If the plaintiff's claim comes outside the Code, then it logically cannot "arise under' the Code, and therefore §1340 cannot provide plaintiff with jurisdiction."

In this case Grable alleged a quiet title action under the laws of Michigan and outside of the Code. Indeed, there is no provision in the Code which recognized and allowed Grable to file a quiet title suit. The statute by which Congress specifically created causes of action for civil action are found in 26 U.S.C. §§7401 through 7434. There is no authorization found for a private right of quiet title in these sections. There is not to be found within these statutes any private right to relief, right of remedy or claim related to violations of section 6335(a). Neither Darue nor the 6th Circuit was able to cite such a provision. All the Sixth Circuit panel could do was conclude that Grable's complaint hinged on a violation of 26 U.S.C. §6335(a) and then jump to the conclusion that the alleged violation created an action arising under the laws of the United States. But a mere

violation of the law, even if it is the sole issue, is not enough to create a cause of action, see *Franchise Tax Board,* supra.

Neither 28 U.S.C. §1441(a), nor 28 U.S.C. §1340 are the applicable jurisdictional statutes in this case because Congress gave no jurisdictional authority for a quiet title action between two citizenship of the same state in federal courts. The only exceptions allowed for the district courts to address quiet title actions is that allowed by 28 U.S.C. §2409a and §2410. These two sections specifically waive the sovereign immunity of the United States in quiet title actions in which the United States claims an interest (§2409a), or, has or claims a mortgage or other lien (§2410). That neither of these two statutes is applicable in this case is was made perfectly clear in the response of the United States to Darue's third-party complaint in which the United States was named. The United States specifically stated that it neither claimed an interest in the property, nor did it have or claim a mortgage or other lien against the property. Had 28 U.S.C. §1441(a) been the proper statute then the Sixth Circuit would have had no choice but to remand because the federal courts have no original jurisdiction over quiet title actions between private citizens of a state.

Not only did the Sixth Circuit depart from the accepted rule of interpreting removal statutes narrowly, it also departed from the two requirements for removal regarding original jurisdiction in the district courts. The Supreme Court in *Syngenta,* supra, clearly defined these requirements. The Sixth Circuit, however, neither required original jurisdiction, nor asked the Darue to shoulder its burden of proving that the district court had original jurisdiction. Thus, in its attempt to broaden the scope of the removal statutes to cover the perceived substantial federal interest in revenue, the Sixth Circuit departed from the principle that removal statutes must be interpreted narrowly. Accordingly, this Court should carefully review and reverse

the Sixth Circuit's upholding of the denial of a remand where there was no original jurisdiction.

The bottom line is that the district court, with the Sixth Circuit Court's full approval, has made a decision to broaden the jurisdiction of the district court to quiet a state quiet title claim which it had no jurisdiction or authority to do, especially where the United States is not a party that claims or has an interest in the property. Without jurisdiction to quiet title on state property the district court's opinion is void and has no binding affect in any other court.

F. Failure to Require Defendant to Shoulder Burden of Proving Original Jurisdiction and Presence of Substantial Federal Question.

The granting of the Petition for the Writ of Certiorari brings to this Court issues regarding the prerequisites of both of an original jurisdiction and the presence of a substantial federal question before removal of a state cause of action to a federal district court. The initial requirement of original jurisdiction for removal has been has been addressed and said jurisdiction is found to be lacking. Two questions remain, "Did a substantial federal question exist so as to create federal jurisdiction?" and "Did the Defendant Darue shoulder its burden of proving the existence of such a substantial federal question?"

The answer to both questions is no. The Sixth Circuit, however, affirmed the district court's denial of a motion to remand when there was been no showing of a substantial federal question and no showing of the district court's original jurisdiction. As was discussed above, that decision to affirm has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such

a departure by a district court as to call for an exercise of this Court's supervisory power.

But more importantly, the Sixth Circuit's decision to uphold a denial of a remand of a state cause of action where there is no substantial federal question or original federal jurisdiction conflicts with previous holdings of this Court.

In addition, the 6th Circuit's decision to allow a removal of a state cause of action without the district court having original jurisdiction over the cause of action is in direct conflict with numerous other circuits. It is also in conflict with its own recent decisions and with one of the cases it cited as authority for its alleged three-part synthesized test, i.e. the 7th Circuit case of *Seinfeld v. Austin*, 39 F.3d 761, 764 (7th Cir. 1994). *Seinfeld* requires a federal right of action as a prerequisite before a state case can be removed.

After laying the foundation for its incorrect rationale that jurisdiction of Grable's state quiet title action is founded on 28 U.S.C. §1340, the Sixth Circuit addressed the question of whether the quiet title claim as filed by Grable represented a cause of action 'arising under' the laws of the United States. The resolution of this question determines whether there is a substantial federal question to support a removal under 28 U.S.C. §1441(b). The same resolution will also determine whether there is original jurisdiction under section 1331.

The Sixth Circuit claims, "The long history of Supreme Court guidance concerning the meaning of 'arising under' the laws of the United States has been synthesized into a three part test," see Writ Petition App. A at 5. The court set forth its synthesized three part test:

> "..., a federal question may arise out of a state law case or controversy if the plaintiff asserts a federal right that 1) involves a substantial question of federal law; 2) is frame in terms of state law; and 3) requires interpretation of federal law to resolve the issue."

The Sixth Circuit cited three cases allegedly in support of the three part test: *Long v. Bando Manufacturing of America, Inc.*, 201 F.3d 754 (6th Cir. 2000); *Howery v. Allstate Insurance Co.*, 243 F.3d 912, 918 (5th Cir. 2001) and *Seinfeld v. Austin*, 39 F.3d 761 (7th Cir. 1994).

While the *Long* case and the *Howery* case appear to be consistent with each other and with the synthesized three part test as developed by the Sixth Circuit, they are contrary to the full test as developed by the Supreme Court. They are also contrary to the third case cited by the Sixth Circuit, *Seinfeld v. Austen*, and with numerous other cases, including some within the 6th Circuit.

The *Seinfeld* decision does not support just a three part test. Instead, the *Seinfeld* court adds a crucial element that must be present before a federal question can be considered a substantial federal question supporting a removal. The element the Sixth Circuit, the *Long* court and the *Howery* court neglected to apply is the Supreme Court requirement established through *Merrell Dow Parmaceuticals, Inc., v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed2d 650 (1986), that "if a federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question," *Seinfeld*, supra, 39 F.3d at 764. The *Seinfeld* court specifically adopted, "[a] deferral rule of decision is necessary but not sufficient for federal jurisdiction. There must also be a right of action to enforce to enforce that rule," *Seinfeld*, supra, 39 F.3d at 764.

The three part test the Sixth Circuit synthesized is not the complete test as developed by the Supreme Court because it omits the most crucial element of original jurisdiction in the district court. An analysis of several of this Court's decisions will clearly expose the fatal defect in the synthesized three part test.

This Court in *Franchise Tax Board*, supra, found that a state case could be removed if the complaint shows a cause of action arising under the Constitution or laws of the United States or it appears from the complaint that a substantial, disputed question of law that is essential element of the complaint. This Court also found, however, that merely the interpretation of a federal law, even if it is the only question to be decided, does not make it a federal question. Contrary to *Franchise Tax Board*, the Sixth Circuit decision sets the stage for any question or interpretation of a federal law to be considered a federal question and as such, sufficient as grounds for removal.

This Court in *Merrell Dow*, supra, 478 U.S. at 813, adopted the principle that a suit arises under the law that creates the cause of action. The holding in *Merrell Dow* was,

> "We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States."

The *Long* court, supra 201 F.3d at 759 analyzed the *Merrell Dow* decision and felt that it was unclear. The *Long* court felt that *Merrell Dow* still left an opening for federal

jurisdiction based on a substantial federal question of Interest, even though there was no express or implied federal cause of action. The court felt that if the substantial federal interest was framed in terms of state law and the interpretation was necessary for the resolution of the state claim then there would still be federal jurisdiction.

This is not the view that the *Seinfeld* court understood. The *Seinfeld* court, in adopting the *Merrell Dow* position stated, "Under *Merrell Dow*, therefore, 'if a federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question,'" *Seinfeld*, supra, 39 F.3d at 764. Thus, the *Long* incorrectly interpreted *Merrell Dow*. It was the *Long* court's incorrect interpretation of *Merrell Dow* thatthe Sixth Circuit adopted to arrive at the conclusion that a simple substantial federal interest was enough to translate into a substantial federal question and district court original jurisdiction.

This Court in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523, 139 L.Ed2d 525 (1997) affirmed the requirement of original jurisdiction in the district court before a removal was proper. It stated, "The propriety of removal thus depends on whether the case originally could have been filed in federal court." The Court in *City of Chicago* also required a substantial federal question and explained what it meant, "A federal question exists when a right or immunity created by the Constitution or law of the United States is an element, and an essential one of the plaintiff's cause of action," *City of Chicago*, supra, 139 L.Ed2d at 535.

Numerous other cases have held that a state cause of action may include, and even require, the examination of federal law violations, but it will not create a substantial federal question sufficient to establish federal jurisdiction

unless there a federal private right of action was authorized by Congress.[2] For example, In *Smith v. Industrial Valley Title Insurance Co.*, 957 F.2d 90, 93-94 (3rd Cir. 1992), the court adopted the principles of *Merrell Dow* and found that a substantial federal question was not present in a state cause of action alleging a violation of 26 U.S.C. §6045(e)(3) because Congress, through the Internal Revenue Code, did not create a private federal cause of action.

Another example from another circuit is *Jairath v. Dyer*, 154 F3d 1280, 1281-82 (11th Cir. 1998). In that case a patient who tested HIV sued doctor for not operating on him in violation of the Americans with Disabilities Act (ADA) and state law. The 11th Circuit found that the ADA created the duty but federal court lacked subject matter jurisdiction. The court went on to note on page 1282 that,

> "federal-question jurisdiction may be based on a civil action alleging a violation of the Constitution, or asserting a federal cause of action established by a congressionally created

---

[2] In addition to others already cited, the following are cases in other circuits that adhere to the requirement of a federal right of action to support federal question jurisdiction: *PCS 2000 LP v. Romulus Telecomms., Inc.*, 148 F.3d 32, 35 (1st Cir. 1998) ("unless a federal statute bestows a private right of action, courts aught to presume that Congress did not intend to confer federal jurisdiction'); *Zubi v. AT&T Corp.*, 219 F3d 220, 223, at n5 (3rd Cir. 2000); *Mulcahy v. Columbia Organic Chem. Co., Inc.*, 29 F.3d 148, 152 (4th Cir. 1994) ("Under *Merrell Dow*, if a federal law does not provide a private right of action, a state law action based on its violation does not raise a 'substantial' federal question"); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1168 (5th Cir. 1988) "*Merrell Dow* held that a private federal remedy was a necessary predicate to determining whether a presence of a federal element in a state-created cause of action resulted in that cause of action being one which arose under federal law'); and *Wander v. Kaus*, 304 F.3d 856, 859 (9th Cir. 2002).

> expressed or implied private remedy for violations of a federal statute," citing *City of Huntsville v. City of Madison*, 24 F.3d 169, 171 -172 (11th Cir. 1994)

Jairath and in *Merrell Dow* are similar to Grable's situation in that the violation of federal law was in fact a necessary element of the respective state law claims. The *Jairath* court acknowledged the statement in *Franchise Tax Board* that a federal question may arise if there is a vindication of a right under federal law if that right turned on some construction of federal law. But the *Jairath* court also noted that *Merrell Dow* stated the statement must be read with caution. *Jairath* court ultimately followed the correct holding of *Merrell Dow*. That holding was that a violation of federal law does not automatically create federal-question jurisdiction. *Jairath* then concluded that Congress had not created a private right of action (remedy) for a violation of federal law.

In addition, *Merrell Dow* 478 U.S. at 812 firmly sealed the Supreme Court's policy regarding the creation of a private remedy when none existed with,

> "[I]t would flout congressional intent to provide a private federal remedy for the violation of the federal statute. We think it would similarly flout, or at least under mine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a 'rebuttable presumption' or a 'proximate cause' under state law, rather than a federal action under federal law.

And continued on page 814,

> "Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. ... We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently ' substantial' to confer federal-question jurisdiction."

The *Jairath* case and Grable's case are parallel to the *Merrell Dow* case. In *Merrell Dow* no federal jurisdiction was found by the Supreme Court where a state law cause of action incorporated as an element of proof of the violation of a federal duty (i.e., not to misbrand). In *Jairath* , it was not to discriminate, while in Grable's case it the requirement to personally serve notice of seizure. But, in any event, in all three cases, there was no private cause of action with respect to the federal duty.

Even the 6th Circuit has recognized this principle in several cases.[3] In *Heydon v. MediaOne of Southeast Michigan, Inc.*, 327 F.3d 466, 471-72 (6th Cir. 2003) the 6th Circuit found that no federal question jurisdiction exists when

---

[3] In the recent case of *Amsouth Bank v. Dale*, 386 F.3d 763 (6th Cir. 2004) the 6th Circuit, contrary to its position in *Grable*, indicated that it correctly understood the *Merrell Dow's* requirement of a federally created right of action.

there is no private cause of action provided in the Cable Communications Policy Act by Congress.

Similarly, in *Board of Trustees of Painesville Township v. City of Painesville, Ohio*, 200 F3d 396, 399 (6th Cir. 1999) township and private owners brought action alleging a failure on the part of the city to provide them with wastewater treatment service in violation of Clean Water Act. 33 U.S.C. §1365 of the Clean Water Act was the sole source for the private litigant to seek to enforce portions of the Clean Water Act. The 6th Circuit found that the Clean Water Act did not provide a private right of action. In so holding it specifically stated, "It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it," citing *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n.*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed2d 435 (1981).

Not only did the 6th Circuit in deviate from its own recognized principle of requiring a private right of action created by Congress its decision to find a substantial federal question in Grable's complaint, but it also violated it own mandate not to articulate federal interest issues.

One of the key factors in its decision to find a substantial federal question was the 6th Circuit's discussion relating to the merits of the government's interests with tax collections. "It is not the role of federal courts to articulate federal interest – but to enforce the federal interest identified by Congress, " *Painesville Township,* supra 200 F3d at 400, citing *Musson Theatrical Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1250 (6th Cir. 1996)[4]

[4] Another case that rejected the mere presence of federal interest was *Nicodemus v. Union Pacific Corp.*, 318 F.3d 1231, 1236 (10th Cir. 2003) (Federal interest in a railroad right-away was not deemed sufficient to create a substantial federal question. A federal private right of action was required).

The question was asked earlier, "What right or immunity was created by what Act of Congress providing for revenue, or for that matter any Act of Congress, constitutes Grable's alleged cause of action founded in quiet title?" According to this Court in *City of Chicago* it is the appropriate question to ask. The answer, however, cannot be found in the Sixth Circuit decision.

IV. Conclusion

All of the Supreme Court cases cited above require a substantial federal question, i.e. a right that can be enforced in federal court. They all also implemented the well-pleaded complaint rule.

In the *Franchise Tax Board* case there was a federal question, but it was not deemed removable because it was not actionable in federal court. In *Merrell Dow* the mere violation of a federal labeling statute was deemed insufficient to create a substantial federal question. Perhaps *Beneficial National Bank v. Anderson*, 539 U.S. 1, 156 L.Ed2d 1, 123 S.Ct. ___ (2003) has indirectly, but completely, answered the ongoing issues of substantial question jurisdiction.

In *Beneficial* plaintiffs filed cause of action in state court alleging usury law violations under state law. Defendant removed to federal court on the grounds of a federally created right under section 85 and 86 of the National Bank Act. Supreme Court ruled that the sections created exclusive federal rights. The important aspect of the *Beneficial* case is not its holding, but in its strong dictum that

supported the holding. At *Beneficial*, supra 156 L.Ed2d, at 5 this Court stated,

> "As a general rule, absent diversity jurisdiction, a case is not removable if the complaint does not affirmatively allege a federal claim. Potential defenses, including a federal statute's pre-emptive effect, *Franchise Tax* ... do not provide a basis for removal. One exception to the general rule occurs when a federal statute completely pre-empts a cause of action."

In addition, 156 L.Ed2d at 7 this Court stated,

> "A civil action filed in a state court may be removed to a federal court if the claim is one 'arising under' federal law. §1441(b). To determine whether the claim arises under federal law, we examine the 'well-pleaded' allegations of the complaint and ignore potential defenses: 'a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or the Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. ... ***As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmative allege a federal claim.***" Emphasis added.

Thus, this Court's latest statement on substantial question jurisdiction and removal issues mandates that a

federal claim or right of action be alleged in the complaint before removal is proper.[5] Grable only alleged a violation of §6335(a). Congress has not provided a private right of action to enforce such a violation. Accordingly, there is in fact no substantial federal question involved in Grable's state quiet title and the case was improperly removed as the district court did not have original jurisdiction.

The 6th Circuit in deciding against Grable on the federal jurisdiction issue completely disregarded the well-pleaded complaint rule, created a legally unsupported test to determine original jurisdiction, and opted for the mere violation of a federal statute, as opposed to the generally accepted requirement of a federally created right of action, to create federal question jurisdiction. The decision of the 6th Circuit must be reversed with the case being remanded back to the district court with instructions to remand the case to the Michigan courts where the quiet title action belongs.

February 22, 2005

Respectfully submitted,

Charles E. McFarland
Counsel for the Petitioner
338 Jackson Road
New Castle, KY
(502) 845-2754

---

[5] A case just decided on February 17, 2005, *Binder & Binder PC v. Barnhart*, 2005 U.S. App. LEXIS 2776 (2nd Cir. 2005) cited *Beneficial* as its authority in reaching its decision to remand for the determination of jurisdiction.

Appendix

28 U.S.C. §1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

Section 6335. Sale of seized property

(a) Notice of seizure

As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or

business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

28 U.S.C. §6339. Legal effect of certificate of sale of personal property and deed of real property

(b) Deed of real property

In the case of the sale of real property pursuant to section 6335 -

(1) Deed as evidence

The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and

(2) Deed as conveyance of title

If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

MCL §600.2932 Quieting title; interest of plaintiff; action by mortgagee; establishment of title; tenancy in common; actions.

Sec. 2932.

(1) Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest

inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

(2) No action may be maintained under subsection (1) by a mortgagee, his assigns, or representatives for recovery of the mortgaged premises, until the title to the mortgaged premises has become absolute, or by a person for the recovery of possession of premises, which were sold on land contracted, to whom relief is available under subdivision (1) of section 5634.

(3) If the plaintiff established his title to the lands, the defendant shall be ordered to release to the plaintiff all claims thereto. In an appropriate case the court may issue a writ of possession or restitution to the sheriff or other proper officer of any county in this state in which the premises recovered are situated.

(4) Any tenant or tenants in common who recovers any undivided interest in lands in an action under subsection (1) against a person or persons who may be in possession thereof, but who does not show in the trial of such action that he or they have any interest therein or title thereto, may take possession of the entire premises subject to all of the rights and interest of the other tenant or tenants in common therein.

(5) Actions under this section are equitable in nature.

MRCP, Rule 3.411 Civil Action to Determine Interests in Land

(A) This rule applies to actions to determine interests in land under MCL 600.2932. It does not apply to summary proceedings to recover possession of premises under MCL 600.5701-600.5759.

(B) Complaint.

(1) The complaint must describe the land in question with reasonable certainty by stating

(a) the section, township, and range of the premises;

(b) the number of the block and lot of the premises; or

(c) another description of the premises sufficiently clear so that the premises may be identified.

(2) The complaint must allege

(a) the interest the plaintiff claims in the premises;

(b) the interest the defendant claims in the premises; and

(c) the facts establishing the superiority of the plaintiff's claim.

(C) Written Evidence of Title to be Referred to in Pleadings.

(1) Written evidence of title may not be introduced at trial unless it has been sufficiently referred to in the pleadings in accordance with this rule.

(2) The plaintiff must attach to the complaint, and the defendant must attach to the answer, a statement of the title on which the pleader relies, showing from whom the title was obtained and the page and book where it appears of record.

(3) Within a reasonable time after demand for it, a party must furnish to the adverse party a copy of an unrecorded conveyance on which he or she relies or give a satisfactory reason for not doing so.

(4) References to title may be amended or made more specific in accordance with the general rules regarding amendments and motions for more definite statement.

(D) Findings As to Rights in and Title to Premises.

(1) After evidence has been taken, the court shall make findings determining the disputed rights in and title to the premises.

(2) If a party not in possession of the premises is found to have had a right to possession at the time the action was commenced, but that right expired before the trial, that party must prove the damages sustained because the premises were wrongfully withheld, and the court shall enter judgment in the amount proved.